

EXHIBIT 11

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Yvonne Gonzalez Rogers, Judge

CHASOM BROWN, ET AL.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. CV 20-03664-YGR
)	
GOOGLE LLC,)	
)	
Defendants.)	
_____)	

Oakland, California
Wednesday, November 29, 2023

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504

BY: DAVID BOIES, ESQUIRE

BOIES SCHILLER FLEXNER LLP
44 Montgomery Street, 41st Floor
San Francisco, CA 94104

BY: MARK MAO, ESQUIRE
BEKO REBLITZ-RICHARDSON, ESQUIRE
JOSHUA STEIN, ESQUIRE
LAUREN LAVARE, ESQUIRE

BOIES SCHILLER FLEXNER LLP
100 SE 2nd Street
Miami, FL 33131

BY: JAMES LEE, ESQUIRE

Reported By: Pamela Batalo-Hebel, CSR No. 3593, RMR, FCRR
Official Reporter

APPEARANCES CONTINUED:

For Plaintiffs:

BOIES SCHILLER FLEXNER LLP
725 S. Figueroa Street
Los Angeles, CA 90017

BY: LOGAN WRIGHT, ESQUIRE

SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067

BY: AMANDA BONN, ESQUIRE

SUSMAN GODFREY LLP
1301 Avenue of the Americas
New York, NY 10019

BY: ALEXANDER FRAWLEY, ESQUIRE
RYAN SILA, ESQUIRE

MORGAN AND MORGAN
201 N. Franklin Street, 7th Floor
Tampa, FL 33602

BY: RYAN MCGEE, ESQUIRE
JOHN A. YANCHUNIS, ESQUIRE

For Defendant:

QUINN EMANUEL URQUHART SULLIVAN LLP
191 N. Upper Wacker Drive, Suite 2700
Chicago, IL 60606

BY: ANDREW SHAPIRO, ESQUIRE
JOSEPH MARGOLIES, ESQUIRE
TEUTA FANI, ESQUIRE

QUINN EMANUEL URQUHART SULLIVAN LLP
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017

BY: STEPHEN BROOME, ESQUIRE
RACHEL MCCrackEN, ESQUIRE
VIOLA TREBICKA, ESQUIRE
CRYSTAL NIX-HINES, ESQUIRE

QUINN EMANUEL URQUHART SULLIVAN LLP
51 Madison Avenue
New York, NY 10010

BY: JOMAIRe CRAWFORD, ESQUIRE

1 **MS. NIX-HINES:** Wow.

2 **THE COURT:** Okay.

3 **MS. CRAWFORD:** Good morning, Your Honor. Jomaire

4 Crawford, Quinn Emanuel Urquhart Sullivan, for Google.

5 **THE COURT:** Okay. Good morning.

6 **MR. MARGOLIES:** Good morning, Your Honor. Joseph

7 Margolies from Quinn Emanuel for Google.

8 **THE COURT:** Okay. Good morning.

9 **MS. FANI:** Good morning, Your Honor. Teuta Fani from

10 Quinn Emanuel for Google.

11 **THE COURT:** Good morning.

12 Obviously lots of firepower on both sides and me and my

13 little team on this side.

14 Okay. We have a lot to do today. Who is leading on both

15 sides?

16 **MR. BOIES:** Your Honor, I will lead on our side,

17 although many other people will participate.

18 **THE COURT:** All right. Then stay at the microphone,

19 sir.

20 **MR. BROOME:** I think it depends on the issues,

21 Your Honor. We do have all of the different motions --

22 **THE COURT:** We will start with your trial readiness

23 binder. Motions will come later.

24 **MR. BROOME:** Okay. I believe that will be

25 Ms. McCracken.

1 **MR. BOIES:** Your Honor, before we commence with the
2 Court's schedule, could I take a moment to update the Court on
3 discussions that we had with plaintiffs' counsel yesterday?

4 **THE COURT:** With defense counsel?

5 **MR. BOIES:** That we had with defense counsel
6 yesterday.

7 **THE COURT:** Okay. Go ahead.

8 **MR. BOIES:** The Court is aware that we, rather
9 belatedly, made a motion for certification with respect to a C4
10 class. We informed counsel for Google last night that we are
11 withdrawing that motion. In light of that and in light of some
12 of the other developments in the case, including the difficulty
13 that we have had simplifying the case and dealing with the jury
14 instructions, we also informed Google that we were withdrawing
15 our demand for a jury trial.

16 **THE COURT:** So that's interesting. Do I have the
17 option of not allowing you to withdraw the jury demand?

18 **MR. BOIES:** Well, they -- they can keep me from
19 withdrawing the jury demand.

20 **THE COURT:** Are you keeping the jury demand?

21 **MR. SHAPIRO:** So, Your Honor, we only learned about
22 this yesterday afternoon, and we're still processing it, but we
23 like our chances with a jury and we like the jury system, so
24 this came kind of out of the blue to us. We welcome the
25 plaintiffs giving us a heads-up about it yesterday, but we

1 don't have a position yet.

2 And it's correct, that once a jury demand has been made,
3 the consent of the defendant is needed to withdraw it. So we
4 don't have a position on that yet, Your Honor. We have a lot
5 of jury instructions and verdict forms and everything we've
6 been working on, of course.

7 **THE COURT:** Well, we do, and my -- you know, good or
8 bad, I write too much when I have to do a bench trial, and with
9 a jury trial, I don't have to write so much. The jury just
10 gets to decide.

11 **MR. BOIES:** Right.

12 **THE COURT:** And the Ninth Circuit or most circuits
13 don't -- do not -- I think most circuits give jury verdicts a
14 bit more deference than they give district judges.

15 **MR. BOIES:** Your Honor, I would say that if -- if the
16 Court -- we realize that we're making this decision late. If
17 the Court would since prefer us not to do that, I think we
18 would not withdraw our jury demand.

19 We don't intend by this to put anybody out. The defendant
20 had previously said that they thought it ought to be a bench
21 trial. We thought by waiving the jury trial, it would expedite
22 things, but --

23 **THE COURT:** Well, I mean --

24 **MR. BOIES:** -- we're prepared to go either way.

25 **THE COURT:** There are pros and cons, obviously. I

1 **MS. BONN:** Understood Your Honor.

2 **THE COURT:** I give these instructions at the beginning
3 and I give them at the end. That's the way I do it. The
4 objections are overruled.

5 With respect to -- it appears as if -- okay. Off the bat,
6 I am not your advocate, period. You should never give me
7 anything that would suggest to the jury that I care one way or
8 the other who wins this case. It is the jury's decision to
9 decide that.

10 So your statements frequently -- you know, that's why we
11 use models, because lawyers can't help themselves, and you
12 really should. You can't help yourselves to somehow suggest
13 things should be in instructions that are merely a recitation
14 of your theory of the indication.

15 If by the end of two weeks they don't know what data we
16 are talking about, you have failed on both sides. So why do I
17 need to explain that to them?

18 These are instructions for the end of the case, and you
19 think that they're not going to know what data we're talking
20 about? So what are we going to call it? I called it "at-issue
21 data" because that's the data that was at issue. The point is
22 to try to get this to the jury packaged in a way where they can
23 make the decision.

24 So what are you going to call it at trial? What are you
25 going to call it?

1 **MS. BONN:** Plaintiffs -- it's been used throughout the
2 case -- have called it "private browser" or "private browsing
3 data" because you're in a private browsing mode. So I just
4 think in practicality --

5 **THE COURT:** That's what you are going to use?

6 **MS. BONN:** That's what --

7 **THE COURT:** And what are you going to use?

8 **MS. TREBICKA:** Your Honor, the parties have called it
9 "at-issue data" throughout this case. Private --

10 **THE COURT:** Okay. So look at what you're going to do.
11 You're going to rewrite this knowing that the other side is not
12 going to use the same term as you. And I guarantee you that by
13 the end of the two weeks, they will know that you're not using
14 the same term. But I'm not going to use your terms. So figure
15 it out and rewrite it.

16 This is not a class action trial, and I am not inclined to
17 make it more complicated by suggesting that it is.

18 **MS. BONN:** Yes, Your Honor. I understand that.

19 One of the concerns that we have is that the reality of
20 our named plaintiffs' damage claims individually are like three
21 dollars a person, and I think that the jury is just going to be
22 confused and furious to be sitting here going *why are the*
23 *plaintiffs making us sit here in a jury box for a two-week*
24 *trial over a hundred dollars a plaintiff*, and I think that just
25 having -- we don't --

1 **THE COURT:** So how are you going to answer that
2 question?

3 **MS. BONN:** I think some context that they are also
4 issuing a finding that the Court will consider on behalf of the
5 class. That's it. We just want them to understand that what
6 they are finding matters not only for three dollars a plaintiff
7 or whatever it is, but the Court will take it into
8 consideration on behalf of the class as a whole. That is, I
9 think, important context for the jury not to be left with this
10 total misimpression that their time is just being wasted on a
11 fool's errand over a hundred dollars in federal court.

12 **THE COURT:** Response.

13 **MS. NIX-HINES:** Thank you, Your Honor.

14 Well, first of all, we would be happy to stip to a hundred
15 dollars total damages if opposing counsel would like.

16 In all seriousness, Your Honor, I think in all the
17 instructions that are before you, this is the one that is most
18 prejudicial to Google. There is absolutely no reason that
19 plaintiffs should be told anything about classwide damages.

20 They lost a damages class. There is no reason that the
21 jury -- and you can hear it even in the way counsel has
22 described it, that they want to indicate to the jury that there
23 are, in fact, millions of people behind these five plaintiffs
24 that -- that are the only things that they are deciding.

25 And it would be extremely prejudicial to Google. It would

1 convey that they've done something wrong, that there are a lot
2 of other people out there like the plaintiffs that have these
3 claims, and that is not, as Your Honor indicated this morning,
4 anything that the jury is going to be deciding.

5 And there is -- the probative value of that is minimal.
6 The prejudice is incalculable.

7 **MS. BONN:** May I respond briefly on that?

8 The notion that the jury won't hear that Google's
9 practices affect millions of people is wrong on the merits
10 because some of our claims have an element that depends on
11 whether the conduct at issue is highly offense to a reasonable
12 person, and Google itself has taken the position that it
13 relates to whether it violates social norms.

14 So the notion that somehow the jury is going to be walled
15 off from the fact that Google wasn't simply cherrypicking these
16 five people and targeting them with Incognito collection, but,
17 rather, they engaged in a practice that led them to profit and
18 that actually that's why repeatedly they refused to make
19 changes to Incognito because within the company, there are
20 numerous documents -- and I'm thinking of one in particular
21 where Ms. Porter Felt said, "We received a directive not to
22 make any change to the Incognito language or otherwise that
23 could affect our revenue."

24 So the idea that somehow we can create a hermetically
25 sealed system where the jury is just only going to hear

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Sunday, December 3, 2023

Pamela Batalo Hebel

Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR
U.S. Court Reporter